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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1040~~ 1147

COMMISSIONER OF INTERNAL REVENUE,
Plaintiff and Respondent,

vs.

WILSHIRE HOLDING CORPORATION,
Defendant and Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. .....

COMMISSIONER OF INTERNAL REVENUE,

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vs.

WILSHIRE HOLDING CORPORATION,

Defendant and Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Murray M. Chotiner, on behalf of petitioner, Wilshire Holding Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 6, 1956, rehearing denied April 15, 1957.

Opinions Below.

The Tax Court of the United States in the consolidated cases of Walburga Oesterreich v. Commissioner of Internal Revenue and Wilshire Holding Corporation v. Commissioner of Internal Revenue, Dockets Nos. 32946 and 32954, rendered a decision against Walburga Oesterreich and in favor of Wilshire Holding Corporation on March 9, 1953, based on a Memorandum Findings of Fact [Oesterreich, Tr. of Rec. pp. 172-180]. The opinion is reported in 12 Tax Court Memorandum 277. The Memorandum Findings of Fact and Opinion are set forth as Appendix "A."

The United States Court of Appeals for the Ninth Circuit on the petition of Walburga Oesterreich v. Commissioner of Internal Revenue, No. 13924, reversed the decision of the Tax Court on October 29, 1955. The opinion is reported in 226 F. 2d 798, Ninth C. C. A., and is set forth as Appendix "B."

The United States Court of Appeals for the Ninth Circuit granted the motion of the Commissioner of Internal Revenue summarily to reverse the decision of the Tax Court in the case of Commissioner of Internal Revenue v. Wilshire Holding Corporation, No. 14100, on December 6, 1956 [Tr. of Rec. Doc. 21-22]. The Memorandum Opinion and Order of the United States Court of Appeals is set forth in Appendix "C."

The Petition for Rehearing and Rehearing *En Banc* were denied by the United States Court of Appeals on April 15, 1957 [Tr. of Rec. Doc. 23].

Jurisdiction.

The judgment of the United States Tax Court was made March 9, 1953 and entered March 16, 1953. This judgment was reversed by the United States Court of Appeals and entered on October 29, 1955 and December 6, 1956. Petitioner's application for rehearing and rehearing *en banc* were denied by the United States Court of Appeals on April 15, 1957. There are no further remedies available to petitioner, and the jurisdiction of the Court is invoked under 28 U. S. C. A., Sec. 1257(3).

Questions Presented.

(a) Was the decision of the United States Court of Appeals rendered contrary to the Court's rules?

(b) Was the decision of the United States Court of Appeals contrary to law—in that where there is a lease

with a right to purchase are the rental payments to be considered as purchase price payments before the purchase price is exercised or exercisable or until it may be predicted with certainty that the right will be exercised?

(c) Was the decision of the United States Court of Appeals contrary to law—in that a review is limited to questions of law?

(d) Was the decision of the United States Court of Appeals contrary to the evidence—in that the real intent of the parties was to effect a lease rather than a sale; and in that there was a valuable consideration for the future transfer of title other than the monthly payments; and in that Wilshire Holding Corporation has not acquired an equity in the property; and in that the payments by Wilshire Holding Corporation are commensurate with the benefits derived by it?

Statute and Rule Involved.

Title 26, U. S. C. A., Section 23(A):

"DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:

(a) Expenses

(1) Trade or business expenses

(A) In general, all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; travelling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the

continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title, or in which he has no equity."

Rule 15, Subdivision 2, United States Court of Appeals for the Ninth Circuit:

"One-half hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the Court, granted before the argument begins."

Statement of Case.

Heretofore the Tax Court of the United States in the case of Walburga Oesterreich v. Commissioner of Internal Revenue ruled in favor of the Commissioner of Internal Revenue, and in the companion case of Wilshire Holding Corporation v. Commissioner of Internal Revenue ruled in favor of Wilshire Holding Corporation.

That thereafter Walburga Oesterreich appealed the decision of the Tax Court to the United States Court of Appeals in the case of Walburga Oesterreich v. Commissioner of Internal Revenue, No. 13924; and the Commissioner of Internal Revenue took a protective appeal in the case of Commissioner of Internal Revenue v. Wilshire Holding Corporation, No. 14100.

Pursuant to a stipulation of the parties, proceedings on appeal in case No. 14100 were held in abeyance pending the decision of the Court in the Oesterreich case, No. 13924.

Wilshire Holding Corporation was permitted to file a brief *amicus curiae* in the Oesterreich case and was permitted to argue at the time of oral argument in the Oesterreich case.

The United States Court of Appeals reversed the Tax Court in the Oesterreich case on October 29, 1955.

Wilshire Holding Corporation on November 6, 1955 asked the Attorney General to file a petition for rehearing in the Oesterreich case and on November 10, 1955 the Attorney General informed your petitioner that it would not do so.

That thereupon, on November 23, 1955, Wilshire Holding Corporation petitioned the United States Court of Appeals for an order permitting it to file a petition for rehearing in the Oesterreich case as *amicus curiae*, and submitted the proposed petition therewith.

That the United States Court of Appeals on June 6, 1956 denied the said petition of Wilshire Holding Corporation to file a petition for rehearing as *amicus curiae* in the Oesterreich case.

That the Commissioner of Internal Revenue after the decision in the Oesterreich case made a motion that the decision of the Tax Court in the above entitled case be summarily reversed on the basis of the Court's opinion in the Oesterreich case.

Wilshire Holding Corporation filed its written objections to the motion to reverse and thereafter, without a hearing or affording an opportunity to Wilshire Holding Corporation to submit oral argument, the United States Court of Appeals on December 6, 1956 made an order granting the motion summarily to reverse the Tax Court in the above entitled action.

That thereafter, on April 15, 1957, the United States Court of Appeals denied the petition of Wilshire Holding Corporation for a rehearing and request for a rehearing *en banc*.

ARGUMENT.

POINTS AND AUTHORITIES.

(Unless otherwise stated, reference to pages is to the Oesterreich Transcript of Record—Stip. refers to Stipulation; Par. refers to Paragraph; Dep. refers to Deposition of W. Frank Moulton, and Ex. Refers to Exhibit.)

I.

The Decision Was Rendered Contrary to the Court's Rules.

Rule 15, Subdivision 2, provides: "One-half hour on each side shall be allowed to the argument of a motion. . . ."

In this case the motion of the Commissioner of Internal Revenue summarily to reverse was dated November 8, 1955, and the Court granted the motion on December 6, 1956, more than a year later, without setting the motion on the calendar for argument and without granting Wilshire Holding Corporation the one-half hour for argument as provided in Rule 15.

Rule 23 provides: "A petition for rehearing may be presented within thirty days after judgment. . . ." In the Oesterreich case the Attorney General refused to file a petition for rehearing, and the Court denied leave to Wilshire to file a petition for rehearing as *amicus curiae*.

It is obvious that the spirit, if not the letter, of the Court's own rules was violated by the Court when it summarily granted the motion of the Commissioner of Internal Revenue summarily to reverse the decision of the Tax Court.

Counsel respectfully urge that the Court is in error when it states in its opinion summarily reversing the

Tax Court that "the Wilshire Holding Company had its day in Court." The Court is also in error when it states in its opinion that the Wilshire Holding Company "was permitted to use the full time assigned to the respondent for oral argument" in the Oesterreich case. While it is true that Counsel for Wilshire did argue at the time of oral argument, the Attorney General's office representing the Commissioner of Internal Revenue also presented oral argument.

It is manifestly clear that Wilshire did not have its full day in Court, and it is also manifestly clear that the decision summarily to reverse the Tax Court did not give Wilshire full consideration on its merits, in view of the failure to permit oral argument by Wilshire in connection with the motion to reverse, and in failing to permit Wilshire to file a petition for rehearing in the Oesterreich case when the Attorney General refused to do so.

Since it appears that the Court was going to decide the Wilshire case on the basis of the Oesterreich case, it should have afforded every opportunity to Wilshire fully to present its position. This the Court did not do when it would not allow Wilshire to file a petition for rehearing. Furthermore, Wilshire did not have its full day in Court when it was not afforded the opportunity orally to argue the motion to reverse, for as stated in the written objections to the motion to reverse, the decision in the Oesterreich case was not necessarily controlling. Wilshire was and still is prepared to submit to the Court the contention that if any of its payments to Oesterreich are to be capitalized instead of deducted as a business expense, that such capitalization should not occur until the "purchase price" of the property is reached, or in the alterna-